SYKT. PENG HONG ENGINEERING WORKS

v.

KONG WOON CHEE CONSTRUCTION

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P 170 OF 1979]
15 MAY 1985

CIVIL PROCEDURE: *Contract for work done and materials supplied - Claim for balance sum - Substantial dispute on quantum - Liability - Interpretation of contract - To prove claim - Evidence to be led - Counterclaim - Set-off - Credit balance due to defendants - Alleged breach of contract by plaintiffs - Proof of counterclaim - Supporting evidence necessary.*

The plaintiffs, a trading company, claim a balance sum of RM173,559.88 against the defendants for work done and materials supplied. The works involved the installation of a security barbed wire fence along the Malaysian/Thailand border.

The plaintiff's claim was substantially disputed by the defendants. Much evidence was led by both parties in support and to dispute their respective claims. The defendants on the other hand counterclaimed for a sum of RM227,469.22. Their counterclaim was based on the defence of set-off, credit due to the defendants and alleged breach of contract by the plaintiffs. The counterclaim was disputed by the plaintiffs and much evidence was adduced by the defendants to prove the counterclaim.

Held:

[1] The plaintiffs had succeeded in proving a balance sum due from the defendants of RM9,532.12.

[2] The defendants had succeeded in proving their counterclaim up to RM158,282.80.

[3] The amount due to the defendants was set-off by the sum of RM9,532.12 due to the plaintiffs, thus leaving a sum of RM148,750.68 due to the defendants from the plaintiffs.

[4] Interest was ordered at the reduced rate of 6% per annum from 12 December 1979 to date of judgment.

[Judgment for the defendants. Each party to bear its own costs.]

For the plaintiffs - Y.M. Chin (H.B. Lee with him)
For the defendants - S.H. Goon

JUDGMENT

Siti Norma Yaakob J:

In this suit, the plaintiffs, a trading firm, claim a sum of RM207,649.38 being the balance of moneys allegedly due to them from the defendants, a construction firm for works done and materials supplied pursuant to a contract entered between them on 11 March 1977 (AB1). The works undertaken by the plaintiffs involve mainly in the installation of a security barbed wire fence along the Malaysian/Thailand border covering an area of over 15 miles.

This project of installing the security barbed wire fence was a project of the Government of Malaysia undertaken by its agency, Jabatan Kerja Raya (JKR), to prevent smugglers entering the country through the Malaysian/Thailand border. The plaintiffs, however, were not the

principal contractors as JKR had contracted the works to a company called Pembinaan Dapatjaya Sdn. Bhd. (P4), who in turn sub-contracted the works to the defendants (D28), and they in turn sub-contracted the works further to the plaintiffs (AB1).

The plaintiffs' claim rests on 3 bills dated 25 November 1978 for the sum of RM1,303,259, 7 December 1978 for the sum of RM253.50 and 10 May 1979 for the sum of RM18,984. They had given credit for payments made and materials supplied by the defendants leaving a balance of RM207,649.38 allegedly due and owing from the defendants. However, in the course of the trial, the plaintiffs admitted that they had failed to credit a further sum of RM33,836 and taking this amount into consideration, their claim is reduced from RM207,649.38 to RM173,813.38. Later in the course of his submission, Counsel for the plaintiffs withdrew the second bill dated 7 December 1978 (AB28) as the plaintiffs have accepted all the risks involved in the execution of their works at the site and since AB28 relates to a claim in pursuance of such risks, it is not maintainable against the defendants. To that end, the plaintiffs' claim is further reduced by another sum of RM253.50, thereby leaving a balance of RM173,559.88, being the true amount claimed by the plaintiffs.

The defendants, whilst not disputing that the plaintiffs had done work in installing the fence and had supplied materials for such works, however contend that the reduced sum claimed is excessive and to that end had calculated the amounts they consider to be due to the plaintiffs as shown in AB49 and 50. They also plead a set-off from the materials they had supplied and payments they had made. After such set-off, they counterclaim RM227,469.22 representing the amount they had incurred when the plaintiffs had allegedly breached the contract, AB1, for failing to complete the fencing and remedial works, details of which appear later on in this judgment. They have however dropped their claim for damages for the failure of the plaintiffs to deposit with them a sum representing 5% of the contract price as retention fee.

The plaintiffs have denied liability on the counterclaim.

As the plaintiffs' claim rests on 2 bills dated 25 November 1978 (AB26 & 27), and 10 May 1979 (AB44), and since practically every item of each bill is objected particularly AB26 & 27, I shall now go through them item by item to determine both liability and quantum, before dealing with the counterclaim.

Under item 1 of AB26, the plaintiffs had billed the defendants RM1,006,136 for Type A fencing from T.S. 19, to Padang Besar, covering the length of 81,140 feet at RM12.40 per foot. The only objection here is the differences in the distance of work claimed as the defendants maintain that it was only 81,000 feet and not 81,140 feet.

This bill is headed "Amended Bill" and this is a direct reference to D18, an earlier bill prepared by PW4 in his own handwriting dated 19 September 78 and sent to the sole proprietor of the defendants, DW6, prior to AB26. This item of expenditure claimed in AB26 appears as item 2 in D18 but the area of work done in D18 is stated as 162,000 feet, which represented 2 sides and one side would mean 81,000 feet. PW4 explained that D18 was prepared when work on Type A fencing was only 90% completed and as such it was only a draft bill and not a final bill of costs on which reliance can be placed to ascertain the actual area on which work on Type A fencing was actually done. He did not however explain how he arrived at the figure of 81,000 feet in D18 for one side of fencing work although he testified that he obtained the figure of 81,140 feet from PW3, his supervisor at the site who unfortunately was never asked whether he took any measurements at the site. On the other hand, Pembinaan Dapatjaya Sdn. Bhd., the principal contractors' representative at the site, DW5, testified that

he took measurements together with PW4 and he remembered this distinctly as the purpose of his taking the measurements was to determine the length of work done to enable the principal contractors to determine the extent of their claims to be made to JKR. DW6 also confirmed that prior to receiving D18, PW4 and DW5 had measured the stretch of fencing work done and it was based on such measurements that D18 was prepared by PW4. As PW4 did not explain how he arrived at the figure of 81,000 feet in D18 for one side of fencing work done or the difference of the distance of work done in AB26 and D18 and that the figure of 81,000 feet can only be ascertained by actual measurement, I am allowing the distance of Type A fencing work done on the reduced distance of 81,000 feet and working this figure at the agreed cost of RM12.40 per foot, the plaintiffs' entitlement to item 1 of this bill is reduced to RM1,004,400 as stated in item 1 of AB49.

Item 2 of AB26 refers to the plaintiffs' costs of labour in laying 243,420 feet run of concertina barbed wire for Type A fencing calculated at 60¢ per foot. Under AB1 the plaintiffs were required to lay 2 types of fencing, Type A and Type B. Type A is double fencing with 3 rolls of concertina barbed wires in between as shown in photograph, P8, whilst Type B fencing involved only single fencing as shown in photograph, P9. The plaintiffs claim that under para. (d) of AB1 they are entitled to charge 60¢ per foot per roll of concertina barbed wire as labour charges whereas the defendants maintain that under the same paragraph of AB1, the labour charges had been agreed at 60¢ per foot run for all 3 rolls. To determine this issue, it is necessary to consider what was the intention of the parties with regard to the labour charges when they agreed to express such intention in para. (d) of AB1.

To begin with, AB1 was drawn up by PW4 himself and although he confessed that he does not speak English, it was nonetheless drawn up in English and he maintains that what he actually meant by para. (d) of AB1 was that labour charges were to be calculated at 60¢ per foot per roll. Whilst pleading ignorance to details this does not appear to be lacking of his intentions in para. (a) and (b) of AB1 where costs of supplying concertina barbed wire and angle iron have been amply stated as to leave no room for doubt.

Then again this item of expenditure had been claimed previously as item 6 in D18 where PW4 had billed his labour charges on a calculation of 81,000 feet at 60¢ per foot, a calculation more in line with the meaning expressed in para. (d) of AB1. He did not, in D18, bill the defendants on the multiplication of three. According to him, when he submitted D18, he had already completed 90% of the work in which case he must have already laid 3 rolls of concertina barbed wire but his claim for the labour charges for such work in D18 is based on a per foot calculation and not on the multiplication of three. This again brings to mind whether D18 was indeed a draft estimate of costs as the plaintiffs make it to be but by the very fact that AB26 was submitted 2 months later when the parties had fallen out tends to point that it was not a temporary bill which required correction had not the relationship between them deteriorated subsequent to the preparation of D18. Moreover, DW6 had, on receipt of D18, made a substantial payment of RM25,000 to PW4 and I consider that he would not have made such a payment for such a large amount if D18 was meant to be only a draft estimation of labour charges.

Counsel for the plaintiffs had submitted that since 3 rolls of concertina barbed wire had to be laid and since para. (d) of AB1 speaks only in the singular, I should substitute the plural for the singular and employ the multiplication of three. By submitting so, I consider that the plaintiffs have accepted that there is ambiguity in para. (d) of AB1 as it does not express the proper intention of PW4 as to the proper calculation for labour charges in which case the *contra proferentem* rule applies as to bar PW4 from claiming as he did in AB26. I also

cannot accept that before preparing AB1, PW4 was not aware that he was required to lay 3 rolls of concertina barbed wire as there was evidence to show that as he was not the principal contractor, his contract with the defendants was dependant upon the requirements and specifications of JKR and even with such knowledge, if he still chose to express his intention in the manner as stated in para. (d) of AB1, he has only himself to blame if he had so erred.

As PW4 had sub-contracted the laying of the barbed wires to DW2, he was naturally asked how much DW2 charged him for labour. PW4 flatly refused to divulge the amount he paid DW2 for labour charges but DW2 supplied the missing link when he testified that he only charged PW4 50¢ per foot for his labour charges for all three rolls in which case, PW4 had made a profit of 10¢ per foot on all 3 rolls as a middle man. If however the multiplication of three is accepted, the labour charges for laying three rolls of barbed wire would be RM1.80 per foot and deducting this from the amount he paid DW2 at 50¢ per foot, PW4's profit margin would be very wide indeed as his profit will be RM1.30 per foot. This must be the only logical explanation why he refused to divulge how much he paid DW2 for labour charges.

PW4 also relied on the last sentence in AB1 which states that "payment should go according to the JKR payment" to prove his point that the multiplication of three should prevail. PW2, JKR's junior technician, who overseered the work at the site, testified that the main contractors' bill of costs was calculated on a per foot per roll basis and relying upon this evidence and on the meaning of the last sentence of AB1, PW4 maintains that he is equally entitled to charge per foot per roll when presenting his bill of costs to the defendants. It must be stressed here that the main contractors did not only supply labour but also the concertina barbed wire in which case they needed to measure and quantify how much materials they had actually supplied. In this case, although he had sub-contracted his works to DW2, PW4 however supplied labour and it only stands to reason that he could not charge the defendants in the same manner that the principle contractors had charged JKR. Moreover, I could not interpret the last sentence of AB1 in the manner I have been asked to by the plaintiffs for the reason that PW4 was only a sub-sub-contractor and payments to the main contractors were very much dependant upon PW4 completing his works so that the main contractors can submit their bills for payment to JKR and it was only upon the settlement of such bills by JKR that the defendants would be able to pay the plaintiffs' bills. Thus the last sentence of AB1 is merely declaratory of the fact that PW4 was not the principal contractors but only the sub-sub-contractor.

On the basis that PW4 had not been truthful in presenting his bill, that he had sub-contracted the works to DW2 and as such, he was only a middle man and giving the true meaning of what had been expressed by the parties in para. (d) of AB1, I can only conclude that the multiplication of 3 never crossed the mind of PW4 when he prepared AB1. My conclusion of this is further strengthened when PW4 testified that he was not aware how the main contractors dealt with JKR regarding rates and to me this admission explains the true situation. After he had fallen out with DW6, PW4 became aware as to how DW6 had billed JKR and having made wiser by this knowledge, had handed AB26 containing rates based on a multiplication of three.

As the plaintiffs had failed to prove that they are entitled to charge labour charges on a per foot roll basis, this expenditure should be calculated in the manner shown as item 6 of D18, i.e. 81,000 x 60¢ = RM48,600, the same amount submitted by the defendants as item 2 of AB49.

In item 3 of AB26, the plaintiffs have claimed a sum of RM5,800 being the costs of supplying and fixing Type A fencing gates. As this amount is agreed upon between the parties, I allow this claim at RM5,800.

Item 4 of AB26 is the costs of supplying and erecting Type B fencing for a distance of 9,420 feet at RM6.20 per foot run. Here again the objection is the difference in the area of work covered as the plaintiffs had, in item 3 of D18, claimed a distance of 8,650 feet and when cross-examined, PW4 had testified that Type B fencing covered an area of over 2,400 odd yards. Since PW4 had contradicted himself and had not provided me with the necessary proof that either 9,420 feet or 8,650 feet were covered by Type B fencing, I allow the figure of 8,690 feet as agreed to by the defendants which anyway is a little bit more than that claimed by the plaintiffs in D18 and at RM6.20 per foot, the amount due to the plaintiffs is RM53,878.

Item 5 of AB26 is for materials and labour supplied for erecting Type B fencing around 28 watch towers calculated at 80 feet per watch tower at RM6.20 per foot run. In addition to installing the security fencing, watch towers had also to be erected and in fact, 28 of such watch towers were erected at strategic places and to protect these 28 watch towers, the plaintiffs erected Type B fencing and entry to each watch tower is gained through a gate. The defendants maintain that since each gate was only 3 feet wide, the plaintiffs should have taken the width of the gate into consideration and giving allowance for that, the distance covered by Type B fencing was only 77 feet for each watch tower and at RM6.20 per foot, the amount due to the plaintiffs should be RM13,367. As the plaintiffs have not proved that Type B fencing around each gate in fact covered 80 feet and as the defendants are agreeable to 77 feet, I allow this item of expenditure on the reduced distance of 77 feet for each watch tower and for 28 watch towers at RM6.20 per foot, the amount due to the plaintiffs is RM13,367.

Item 6 of AB26 relates to the price of 28 watch tower gates which the plaintiffs claimed to be RM75 per gate, totalling RM2,100. The only price agreed in AB1 for gates is under para. (c) where gates measuring 8' x 6' 6" were to be charged at RM100 per gate. As the gates erected to the 28 watch towers were only 3 feet wide, PW4 had informed DW6 that he would charge RM75 per gate to which suggestion, DW6 had remained silent. In AB49 however, DW6 claims that RM60 per gate is reasonable and fair. As PW4 had not provided me with sufficient proof that an oral agreement had been reached that gates lesser in size to that specified under para. (c) of AB1 should be charged at RM75 per gate, on balance, I will rely on the figure provided by DW6 as having had the advantage of seeing and hearing both of them, I place more reliance on DW6's evidence than PW4. That being the case, item 6 of AB26 is allowed at RM1,680 being the price of 28 watch tower gates at RM60 per gate.

Item 7 of AB26 is a claim for the price of 3 gates erected at Padang Besar, calculated under para. (c) of AB1 which at RM100 per gate amounted to RM300. As PW4 had admitted that the size of the gates were smaller than that specified under para. (c) of AB1, I allow this item of expenditure at the reduced rate of RM80 per gate as suggested by DW6 as being fair and reasonable and for 3 gates, the total amount allowed is RM240.

Item 8 of AB26 relates to the cost of providing additional vertical barbed wire for Type A fencing as JKR, upon inspection, found there were gaps in the fencing, along the whole stretch from Cuping to Padang Besar, which allowed people to pass through, and additional barbed wires were required to fill up such gaps. The barbed wire provided by the plaintiffs were 11 feet long per piece and according to PW4, the price had been agreed between him and DW6 at 70¢ per piece. For this expenditure, I was referred to AB5, a letter dated 18 July

1978, written by PW4 wherein he had quoted 70¢ as the price of each length of vertical barbed wire. The defendants' reply to AB5 is AB10 and it is clear reading the 2 letters that no agreement had been reached as to price as the plaintiffs' quotation of 70¢ was countermanded by an offer of 60¢ from the defendants. AB10 also referred to a previous agreement reached wherein 50¢ had been agreed as the price to which PW4 had misquoted it as 70¢ in AB5. As the plaintiffs had not led any evidence to any earlier agreement reached, in all probability, that may well have been the price agreed upon by the parties and to that extent, I am allowing the costs of supplying additional vertical barbed wires at 50¢ per piece and as there is no dispute as to the 40,570 pieces used by the plaintiffs, the amount allowed under this item is RM20,285.

I now come to the last item of expenditure in AB26, the costs of supplying materials for the erection of watch towers. It is not disputed that 28 watch towers were erected by the defendants from materials supplied by the plaintiffs. Under the main contract, P4, although 50 watch towers were specified to be built, this number appears to be provisional only as the actual number and allocation where the watch towers were to be sited were dependant upon the CPO picking out the strategic positions along the 15 mile stretch. It was after the allocation of the site had been done by the CPO that JKR came up with the number of watch towers to be constructed and 28 of such watch towers were in fact constructed by the defendants.

The materials supplied by the plaintiffs were m.s. plates of varying dimensions. The prices of each had been quoted by PW4 in his letter, AB3. From the defendants' letter, AB11, it is quite clear that DW6 had objected to the prices quoted in AB3 as being excessive, particularly the prices of items 9(e) and (f) of AB27 which he considered should be reduced to RM70 per set and RM110 per piece respectively. That being the case, there appears to be no agreement reached on the pricing of items 9(e) and (f), and in the absence of such agreement, I am left in the position of deciding whose evidence I can rely to determine the prices to be charged for these 2 items.

PW4 had testified that each m.s. plate costs between RM70 to RM80 and that some work had to be done to the plates before they could be delivered to the site and he had estimated this extra work to be more than RM16. He had also to purchase angle posts for the m.s. plates which costs him another RM18 per post. Added to this, he had to take into account transportation charges and all in all, it costs him well over RM100 per piece. At least this is true of the price of item 9(f) and taking the purchase price of each piece at RM100, PW4 would have made a profit of RM30 each piece as he is now charging the defendant RM130 per piece. On the reduced rate of RM110 per piece as offered by DW6, PW4 still makes a profit of RM10 per piece and although his profit margin is somewhat smaller, he cannot be said to have made a loss from this item of expenditure altogether. Faced with such evidence and in all fairness, I accept the reduced price as given by DW6 and to that extent, I allow the price for Item 9(f) on the reduced rate of RM110 per piece.

No evidence was led as to how PW4 had arrived at the quotation of RM90 per set for the m.s. plates as claimed for in item 9(e), and in the absence of any evidence to that effect I also rely on the amount given by DW6 which is RM70 per set.

Apart from disputing the prices of item 9(e) and (f), DW6 also objected to the quantities of materials supplied. He contends that since only 28 watch towers were built, allowance should only be given for the required quantity of materials sufficient to erect 28 watch towers. The answer to this is for PW4 to produce the delivery notes or invoices to show that he had

actually delivered or supplied the amount of materials as claimed by him. He was able to do so for item 9(a) for in his cross-examination, he referred Counsel to the defendants to 3 delivery orders nos. 0340, 0342 and 0373 which show that he had purchased a total of 136 pieces of m.s. plates. Thus item 9(a) is allowed at 136 pieces at the rate of RM16.50 per piece which amounts to RM2,244.

For items 9(b) - (e), apart from his oral assertions. PW4 did not produce any supporting documentary evidence that he had in fact supplied materials in the amounts he had claimed and to that extent, I had no re-course but to rely on the amounts stated by DW6 in AB50. To that extent, I make the following allowances.

(1) Item 9(b), 448 pieces at the agreed rate of RM4.60 per piece amounting to RM2,060.80.

(2) Item 9(c). for 448 pieces at the agreed rate of RM6 per piece amounting to RM2,688.

(3) Item 9(d) for 896 pieces at the agreed rate of RM1.30 per piece amounting to RM1,164.80. and

(4) Item 9(e) for 56 sets at the reduced rate of RM70 per set amounting to RM3,920.

For item 9(f), however, the quantity claimed is evidenced by delivery orders 0376 and 0369 and together with another 15 pieces which PW4 had personally sent to the site, the total amount comes to 320 pieces. According to PW4, this number is equivalent to 160 pieces measuring 4' x 8'. By delivery order 0373, 30 more pieces were sent by PW4 to the site and together with 10 more sent by him personally, he had accounted for the 200 pieces claimed. I therefore allow this claim for 200 pieces at RM130 per piece amounting to RM26,000.

Adding the various allowances made under item 9 of AB 26, the cost of m.s. plates supplied by the plaintiffs total RM38,077.60.

The final bill submitted by the plaintiffs is AB44 which comes in 2 parts, A and B. A is the cost of extra painting work done at the site on the instructions of the defendants. B relates to the costs of supplying 87 m.s. pipes and the labour charges for erecting such pipes at the middle space of the fencing gates of Type A fencing calculated at RM8 per pipe. As the plaintiffs had not led any evidence to substantiate part B of this claim, I am disallowing this claim for lack of proof.

Coming to part A of the bill, the only issue is whether painting is deemed to have been included in AB1 which is silent on painting. AB1 was entered into on 11 March 1977 and according to PW4, he started work at the site sometime in May 1977. After he had installed the angle posts and gates, DW6 had instructed him to paint them as well and he had accordingly done so. PW4 also admitted that when he supplied materials, they were according to JKR's specifications. JKR had specified at p. 37 of the Specifications in P4 that all metal works had to be painted with 1 coat of approved Metallic Primer, 2 undercoats and 1 finishing coat of high gloss ennamel paint. PW4 denied knowledge of this requirement but all the same, he had given the angle posts a red under coating as he did not want JKR to think that he had supplied rusty angle posts. His supervisor, PW3, testified that he was fully aware of JKR's requirement that all angle posts had to have 2 coats of aluminum paint on top of one coat of anti rust paint but his workers had only applied 1 coat of aluminium paint. As PW3 was aware of JKR's specification, it does not seem right that PW4 was not aware of such requirement and to that extent, I cannot accept PW4's evidence especially in view of his earlier admission that he supplied materials according to JKR's specifications. He must have had a sight of JKR's specifications before agreeing to do the work for without them it

is not possible for him to work out his rates, what more bill the defendants for it. The only conclusion I can arrive why he had not applied the required number coatings of paint is quite obvious as he wanted to cut around the corners of his obligation so that he could earn a larger profit margin. It is quite immaterial that AB1 makes no provision for paint work as AB1 must be read together with P4 and since P4 had envisaged that painting of angle posts must be done before they were installed, painting forms part and parcel of the work undertaken by PW4 and not part of additional work and therefore he cannot claim it as a separate item as in AB44. To that extent, AB44 is disallowed in toto.

Only one area of dispute remains to be determined before I can finally conclude on the plaintiffs' claim namely whether there was any agreement reached as to whether the defendants can charge 5% service charge on all materials supplied by them to the plaintiffs. On this item of expenditure, the plaintiffs have given credit to the defendants in the sum of RM562,247.12 but the defendants maintain that 5% service charge should be added to this amount, thereby, enhancing the figure to RM590,359.48 as claimed for by them in their counterclaim.

Both PW4 and DW6 contradicted each other on this issue with the former declaring there was no such oral agreement to enable the latter to charge 5% service charge on all materials supplied by him. PW4 had admitted that after AB1 was signed, he had asked DW6 for some advance money to purchase angle posts and barbed wires and by this admission, it could only mean that at that point of time, PW4 had insufficient funds of his own to make the necessary purchases. However, in lieu of advances, DW6 agreed to supply him with the materials required to enable PW4 to commence work immediately. This arrangement appears to be contrary to that expressed by them in para. (b) of AB1 wherein PW4 had undertaken to supply these materials. There was also evidence that the invoices for the supply of the materials were made out in the name of DW6 and not in the name of PW4 and that being the case, the responsibility fell upon DW6 to settle all sums due promptly, at least within 2 months of the dates of the different invoices to avoid payment of 5% interest charged by the suppliers for late payment. PW4 delayed paying DW6 for the materials and as a result, DW6 was penalized by the suppliers in the payment of interests.

As the parties had entered into a business transaction, wherein both had only one objective in mind, that they should at all costs, make a profit, it does not stand to reason that DW6 should agree to take on an added responsibility without there being any arrangement made that he should at least be reimbursed for that added responsibility. On balance, I accept DW6's evidence that it was PW4 who agreed to pay him 5% service charge on all materials supplied by him as he, PW4, was anxious to commence work immediately as he had a deadline to meet.

Having established the defendants can claim 5% service charge on the costs of all materials supplied by them to the plaintiffs, the amount that must now be credited by the plaintiffs for materials supplied by the defendants be at RM590,359.48. In the final analysis, adding all allowances made for items 1 - 8 of AB26, the total amount for price of work done by the plaintiffs pursuant to AB1 comes to RM1,148,250. To this figure, further consideration is given to the cost of materials supplied by them which under items 9(a) - (f) of AB27, I had allowed a total sum of RM38,077.60. Adding these 2 figures, the total contract price due to the plaintiffs is RM1,186,327.60. From this sum, the deductables are the progress payments made by the defendants which have been agreed at RM586,436 and the prices of materials supplied by them plus 5% on services for goods supplied which I had allowed at RM590,359.48, thereby reducing the balance due to the plaintiffs to RM9,532.12.

Proceeding now to the defendants' counterclaim, this is based on

(1) the defence of set-off,

(2) the credit balance due to the defendants after adding 5% on invoices for goods supplied which I have held is allowed to be charged by the defendants.

(3) an alleged breach of contract when the plaintiffs failed, (a) to complete fencing up to Bukit Kuan Chuh and (b) to remedy defective works to the satisfaction of JKR.

For their counterclaim, the defendants rely on 3 bills all dated 2 May 1979, AB51, AB54 and Attachment E of the further and better particulars.

Taking AB51 this relates to additional expenses incurred on preliminaries as a result of the plaintiffs stopping work at Padang Besar.

The first issue to be settled here is what is the extent of the works to be done by PW4? Did it stretch only from T.S. 19 to Padang Besar, a distance of 15 miles or did it extend 2 miles further to Bukit Kuan Chuh? To resolve this, it is necessary to look at P4, the related plans, P5, and all relevant evidence adduced.

The plaintiffs contend that fencing work pursuant to AB1 only stretched from T.S. 19 to Padang Besar and not beyond. The plans related to the work are JKR plans, P5, which state that fencing work stretch from T.S. 19 to Bukit Kuan Chuh. This is not disputed. There is also evidence coming from PW2 that the type of fencing involved on this stretch was Type A fencing and DW2 who actually installed the fencing work testified that he completed Type A fencing up to Padang Besar in June 1978, when he stopped work. The reason given by PW3 why work was stopped was because JKR instructed him to do so as the angle posts needed to be modified. He stated further that if JKR had not asked him to stop work, fencing work would have continued past Padang Besar as PW4 did not advise him that fencing should stop at Padang Besar.

In this respect, reference was also made to PW3's conduct in handing over the keys of the gates to the Camp Commandant on 11 December 1978, as conduct amounting to a fulfilment of the plaintiffs' obligation under the contract. This would have been so if the works had been certified as being satisfactorily done by both JKR and the defendants, but there is no evidence that JKR had done so. On the contrary, JKR had, by their letters, AB31, AD52 and AD53 complained that the works were defective. As officers of JKR namely PW1, PW2 and DW1 had confirmed that Type A fencing stretched from T.S. 19 to Bukit Kuan Chuh and since the plan, P5, specifically mentioned these 2 places, the fact that the 15 miles mentioned in P4 had stopped at Padang Besar does not entitle PW4 to unilaterally declare that he had fulfilled his obligation under the contract and to that extent, he had, by stopping work at Padang Besar, breached the contract, AB1.

I consider the true position is succinctly explained by none other than PW4 when he testified as follows in the course of his cross examination.

> When the defendants approached me in 1977 for the sub-contract work, it was agreed that works were to conform to JKR plans. I agree that fencing work was to stretch from T.S. 19 to Bukit Kuan Chuh. When we signed the agreement, the defendants told me that I would have to erect the fencing for a total length of 15 miles. While erecting the fencing, I discovered that from T.S. 19 to Padang Besar, the area covered was already more than 15 miles. This was for Type A fencing. According to my contract, I have to erect 15 miles of fencing. I had to erect the fencing from T.S. 19 for 15 miles up to Padang Besar. I did not mind erecting a little further than 15 miles. I am a sub-sub-contractor and I erected the fencing in accordance

with JKR plans and specifications. The 15 mile fencing was told to me by the defendants verbally but the plans did not specify 15 mile fencing. I did not raise this matter with the defendants. Bukit Kuan Chuh is stated in the plans. My contract with the defendants involves fencing from T.S. 19 to Bukit Kuan Chuh. The defendants told me that the length of the fencing was 18 miles. I agree that the longer the fencing, the more money I can expect to earn.

Another reason given by PW4 why he had stopped work at Padang besar was because DW6 rejected his quotations, AB6 and 7 for the extra work involved in extending the fencing work to Bukit Kuan Chuh, which he maintained amounted to a variation of AB1. Now, what exactly did the fencing work from Padang Besar to Bukit Kuan Chuh entail? There was some confusion on this and to clear this confusion, I now consider the evidence. Taking PW3's evidence first, he testified that JKR asked him to stop work at Padang Besar because the angle posts needed to be modified. From PW2's and DW1's evidence, it is clear that all that the modification required was doing work in securing the concertina barbed wire and for that reason, this modification was referred to as Type A modified fencing. From this modification, DW1 confirmed that the main contractors only lay 3 rolls of concertina barbed wire and not 6 rolls. As a result of this modification, JKR prepared amended plans but the thickness of the angle posts remained the same at 2¼". At the same time that the plaintiffs were installing Types A and B fencing from T.S. 19 to Padang Besar, JKR had also contracted with another contractor, Syarikat Pembinaan Jaya, to install Type A modified fencing from T.S. 19 to Bukit Kuan Chuh in accordance with JKR's plan, 213/78, P5A. From this evidence it is clear that Type A modified fencing stretched not only from Padang Besar to Bukit Kuan Chuh which works were done and completed by the defendants but it also stretched all the way from T.S. 19 to Bukit Kuan Chuh which was done by another contractor, Syarikat Pembinaan Jaya.

Turning now to PW4, he testified that he submitted AB6 and 7 to the defendants as the angle posts for Type A modified fencing were thicker in size to that used in Type A fencing by another ¼" and following JKR's amended plans, he was required to lay 6 rolls of concertina barbed wire which meant that he had to supply more barbed wires than that required for Type A fencing. For AB6 and 7, he relied on JKR's plan, P5A, which he had mistakenly referred to as Plan 213/79. Since there is evidence to show that this plan had nothing to do with either the defendants or the plaintiffs, DW6's action in rejecting AB6 and 7 is therefore maintainable and to that extent, the plaintiffs failed to prove that there had been a variation of his contract with DW6 or that the modification sought for by JKR was of such a nature that a new contract had come into being. Moreover as the modification was only to secure the concertina barbed wires, I do not consider that such modification involved a major change of the works as to vary the nature of the contract entered into between the parties to this trial.

Having ruled that the plaintiffs had breached the contract for refusing to continue fencing work to Bukit Kuan Chuh, are the defendants entitled to charge for preliminaries incurred for completing such work? I answer this positively provided that they prove that such preliminaries were necessary and properly incurred for the purpose of completing the fencing work and that there are supporting evidence both oral and documentary to establish that such expenses were in fact incurred. The defendants have charged such preliminaries in AB51 and since the plaintiffs have challenged all the items stated in AB51, I now go through them to consider what items are allowed as having been proved.

Item 1, is the costs of posting 2 clerks-of-work at the site for 4 months at RM1,100 per person per month. This is proved by the vouchers in AC121 - 124 and is hereby allowed.

Item 2, is the costs for employing 2 watchmen for 4 months at RM350 per person per month. This is also proved by vouchers in AC 137 - 139 and is allowed.

Item 3, is the costs for employing 3 drivers for 4 months at RM550 per person per month. This is also proved by vouchers in AC125 - 129 and is therefore allowed.

Item 4 is for the purchase of 2 secondhand land rovers and such purchases are evidenced by AC177 - 178 amounting to RM13,000 but the amount claimed in AB51 is RM14,129.60 and DW6 explained that the difference referred to costs of repairing the 2 vehicles. As there is no proof that the 2 vehicles were in fact repaired, or that the repairs amount to the difference, I allow item 4 to the extent of only RM13,000.

As for items 5, 6, 8, 9, 10 of AB51, they are not supported by any vouchers or other documents and as such, all the sums claimed under these items are disallowed in toto.

That brings me to the remaining item 7 of AB51 being payment of insurance premiums by the main contractors as evidenced by AC168 -169, 185 and 186 and for which the defendants had to reimburse the main contractors. The defendants now claimed this amount by way of reimbursement from the plaintiffs as the insurance taken covered the plaintiff's workers as well. As there is no evidence to show of any agreement between the parties that the plaintiffs had agreed to reimburse the defendants for premiums of policies taken by the main contractors, I am disallowing this expenditure for lack of proof. Moreover, when DW6 completed the fencing work, PW4's workers were no longer at the site and the policies taken could not possibly be for their benefit.

Thus, on AB51, the defendants have succeeded in proving only part of the preliminaries claimed totalling a sum of RM31,200.

Moving on to the defendants' second bill, AB54, this refers to additional expenditure incurred in completing the fencing work to Bukit Kuan Chuh and repairing the damaged fence and redoing verticle wire stands. I have already held that PW4 did not paint the angle posts with the required number of coatings according to JKR's specifications and it is no wonder that when JKR inspected the site on 9 December 1978, they found the paint work on the angle posts defective and the nuts and bolts to the hinges loose. They complained about this to the main contractors in their letters dated 9 December 1978, AB31. However, two days before the inspection, PW4's solicitors had, at AB29, written to DW6's solicitors informing them that PW4 had completed touch-up work under the supervision of JKR and were preparing to move out. That touch-up work could not possibly have been done satisfactorily as JKR had rejected it as can be seen from AB31. There also cannot be any truth in PW3's testimony that his workers had been painting the angle posts from T.S. 19 to Padang Besar for 3 weeks in the month of January 1979, as the site diary, P7B, which was recorded daily shows that only 6 days of painting were done at Cuping. Moreover, JKR wrote again on 21 January 1979, AD52, to the main contractors, complaining that the remedial painting work was not done satisfactorily and that they were required to effect such work immediately. Following this, JKR wrote a third letter dated 13 March 1979, AD53, wherein they required the main contractors to paint all the angle posts, tighten all loose vertical wires at the isolated places and generally remedying all defective works. As PW4 had taken a stand that further remedial works were no longer required of him and as he was pressured by JKR to effect all the works listed in AD53, DW6 undertook the task of doing such works.

He called for tenders and out of the 5 he received, he chose the lowest, D27, at RM112,600 submitted by DW3 and after bargaining with him, DW6 accepted the tender at the reduced price of RM108,000 and a contract, AC195, was signed between them. As the sum of

RM108,000 has been proved to have been paid by DW6 to DW3, from the supporting payment vouchers in AC149 - 156, I hold that the defendants can recover this amount from the plaintiffs as reasonable costs for repainting, including all touch up works to the angle posts from T.S. 19 to Padang Besar as claimed in item 1 of AB54.

As for remedying the other defective works such as tightening vertical wires and repairing damaged fencing, DW6 had also incurred expenses and since these expenses are supported by vouchers in AC161 - 163 totalling RM16,175, I allow this sum as claimed in item 2 of AB54.

Lastly I come to Attachment E of further and better particulars, being the difference in price for works done by the defendants following the plaintiffs' breach and the price that the defendants would have to pay had the plaintiffs not breached the contract. To arrive at this difference, it is necessary to consider the costs actually incurred by the defendants. As I have already held that the plaintiffs were in breach when they had stopped work at Padang Besar, I am allowing the difference as an allowable item claimed by the defendants. The costs that were incurred by the defendants were for materials, labour and for transporting and hiring lorries.

As there are supporting vouchers for costs of materials supplied in AC171, 174, 179, 180, 183, 187 and 192, I allow the sum claimed at RM80,256.60. However, as DW6 had failed to prove that he had incurred labour charges amounting to RM17,841.20 as claimed for in item (b) of Attachment E, this sum is disallowed. As the costs of transporting and hiring lorry are evidenced by vouchers AC156 and 157, read together with AC 158 and 159, the sum of RM7,740 claimed in item (c) of Attachment E is allowed. So for Attachment E, the total additional costs incurred for completing fencing work from Padang Besar to Bukit Kuan Chuh is allowed at RM87,996.60.

Turning now to the costs that would have been incurred by PW4 had he not breached the contract, he would have to install Type A modified fencing for another 6,862 feet. For this distance based on the agreed cost of RM12.40 per foot pursuant to para. (a) of AB1, the supply of materials would have cost him RM85,088.80. Subtracting the costs incurred by the defendants from that which would have been incurred by PW4, I come to a figure of RM2,907.80 as an allowable item claimed by the defendants.

Adding the figures that I had allowed in AB51, AB54 and Attachment E, the defendants have succeeded to the extent of proving RM158,282.80 on their counterclaim. This amount is to be set-off by the sum of RM9,532.12 being the balance due to the plaintiffs, thereby, leaving a sum of RM148,750.68 as the sum due to the defendants from the plaintiffs after set-off. There will then be judgment of the defendants for this sum and interest at the reduced rate of 6% pear annum from 12 December 1979 to date hereof. As each party had succeeded in proving their respective claims, I also make an order that each party will bear their own costs.

Also found at [1986] 2 CLJ 47